

Richard C. Vasquez (CA SBN 127228)  
[rvasquez@vbllaw.com](mailto:rvasquez@vbllaw.com)  
Jeffrey T. Lindgren (CA SBN 176400)  
[jlindgren@vbllaw.com](mailto:jlindgren@vbllaw.com)  
VASQUEZ BENISEK & LINDGREN LLP  
3685 Mt. Diablo Blvd., Suite 300  
Lafayette, CA 94549  
Telephone: (925) 627-4250  
Facsimile: (925) 403-0900

Attorneys for Defendants  
HEALTHY PETS, INC. AND MANDEEP GHUMMAN

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**THE GARMON CORPORATION, a  
California corporation,**

Plaintiff,

V.

**HEALTHYPETS, INC., a California corporation; MANDEEP GHUMAN.**

## Defendants

Case No: 5:18-cv-809 ODW (SHKx)

Hon. Otis D. Wright II

**DEFENDANTS' REPLY IN SUPPORT  
OF MOTION FOR JUDGMENT ON  
THE PLEADINGS AS TO COUNTS 1-  
4, 6 AND 8 OF THE COMPLAINT**

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1   **I. INTRODUCTION**

2           Defendants' motion for judgment on the pleadings tests the  
 3 sufficiency of Plaintiff's allegations as pleaded—a test Plaintiff fails. Rather  
 4 than demonstrate a viable cause of action, Plaintiff instead relies on "facts"  
 5 that are alleged only in its opposition, not its complaint, and casts conclusory  
 6 legal allegations as "fact." Neither can save Plaintiff's claims from  
 7 dismissal. Plaintiff also fails to directly engage the settled precedent; instead,  
 8 Plaintiff tries to incorrectly narrow the controlling case law or cite to  
 9 decisions that are easily distinguished based the actual facts pleaded by  
 10 Plaintiff in its Complaint. These pleaded facts and the applicable law support  
 11 only one conclusion—Counts 1-4, 6 and 8 must be dismissed.

12   **II. PLAINTIFF'S RECITED FACTS ARE FLAWED**

13       **A. Plaintiff Relies on "New" Facts and Conclusory Legal  
 14           Allegations.**

15           Throughout its opposition Plaintiff cites a litany of "facts" that it tells  
 16 this Court must be accepted as true when analyzing Defendants' motion.  
 17 However, many of these "facts" either appear only Plaintiff's opposition or  
 18 are actually conclusory legal allegations.

19           For example, citing Complaint for Injunctive Relief, Trademark and  
 20 Copyright Infringement, and Damages, ECF No. 1, ("Compl.") ¶¶ 10-20,  
 21 Plaintiff states "TGC's efforts to train the Authorized Dealers are important  
 22 *because incorrect use of TGC products could have no impact, or even a*  
 23 *negative impact, on animals.*" Plaintiff's Response to Defendants' Motion  
 24 for Judgment on the Pleadings as to Counts 104, 6 and 8 of the Complaint,  
 25 ECF No. 90, ("Opp.") at 5 (emphasis added). This "fact" is never alleged in  
 26 the Complaint—neither in the cited paragraphs nor anywhere else.  
 27 Similarly, citing the Complaint ¶¶ 66-73 of the Complaint, Plaintiff states  
 28 "As part of HPI's intentional misappropriation of TGC's intellectual

1 property, *HPI is also using outdated images and product descriptions for*  
 2 *TGC products*, likely due to the fact that HPI no longer has access to  
 3 NATURVET University and other TGC resources exclusive to Authorized  
 4 Dealers.” Opp. at 6 (emphasis added). Again, nowhere does the Complaint  
 5 allege that HPI using “outdated images and product descriptions for TGC  
 6 products.” Citing to Complaint ¶¶ 14-15, Plaintiff states that for a certain  
 7 product “TGC typically provides a NATURVET University pamphlet of up-  
 8 to-date information and *an accompanying product quiz for purposes of*  
 9 *training the Authorized Dealer about the characteristics and appropriate*  
 10 *application of the product.*” Opp. at 4-5 (emphasis added). Like the prior  
 11 “facts” alleged by Plaintiff, this one cannot be found in the cited paragraphs  
 12 or elsewhere in the Complaint.

13 Plaintiff also suggests that Authorized Dealers are “required” to  
 14 comply with its stock rotation policies, citing to Complaint ¶ 17. Opp. at 19.  
 15 But the Complaint alleges only that Authorized Dealers are “expected to  
 16 comply” with the “inventory stock rotation policy” and that “[i]n order to  
 17 encourage compliance with [this] policy, TGC permits Authorized Dealers  
 18 to participate in certain TGC-sponsored … stock rotation programs.” Compl.  
 19 ¶¶ 16-17 (emphasis added). *Encouraging compliance by permitting*  
 20 *participation in a stock rotation program* is far different than contractually  
 21 requiring it. Plaintiff also states, this time without citation to the Complaint,  
 22 that “HPI, as an unauthorized dealer, is selling the TGC products to  
 23 consumers without training, product quality control policies, accompanying  
 24 services *and warranties.*”<sup>1</sup> Opp. at 20 (emphasis added). Again, the

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 27 <sup>1</sup> Plaintiff readily admits that during HPI’s time as an Authorized Dealer,  
 28 HPI received training by Plaintiff and “complimentary access” to  
 NATURVET University. Opp. at 4. This admission (1) counters Plaintiff’s  
 claim that HPI is selling TGC products “without training” and (2) suggests  
 that although Authorized Dealers get *access* to NATURVET University they  
 DEFS’ REPLY ISO MOT. FOR JUDGMENT ON THE PLEADINGS

1 Complaint contains no allegation that any TGC product sold by Defendants  
2 is without warranty. In fact, the word “warranty” never appears in the  
3 Complaint. Plaintiff’s purposeful attempt to base its arguments on facts that  
4 are not actually contained in the Complaint must be rejected.

5 Notably, Plaintiff demands that the Court treat as true legal  
6 conclusions dressed up as fact allegations. For example, Plaintiff argues that  
7 this Court must accept as true the “facts” that “HPI *illegally obtained* TGC  
8 products *by tortiously inducing* Authorized Dealers *to breach their contracts*  
9 with TGC and sell products to HPI” and that “HPI’s actions *cause customer*  
10 *confusion and hurt TGC’s customer goodwill.*” Opp. at 16 (emphasis added).  
11 These are not facts, these are conclusory legal allegations that are not  
12 assumed to be true. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.  
13 1981) (holding legal conclusions cast as fact allegations not assumed true).

14 For the purpose of deciding a Rule 12(c) motion, a court must look to  
15 and accept as true the factual allegations in the complaint and in any  
16 accompanying attached documents. *Roth v. Garcia Marquez*, 942 F.2d 617,  
17 625 n.1 (9th Cir. 1991). To the extent the attached documents refute factual  
18 allegations in the complaint, those allegation need not be accepted as truth.  
19 Id. Likewise, “conclusory allegations of law and unwarranted inferences”  
20 are not deemed to be true or sufficient to preclude dismissal. *Cousins v.*  
21 *Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Consequently, many of the  
22 “facts “on which Plaintiff relies are pleaded nowhere and cannot preclude  
23 dismissal.

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28 may not use it.

1                   **B. Plaintiff's Reliance on the Preliminary Injunction Ruling is  
2 Misplaced.**

3                   Plaintiff repeatedly argues that this Court should reject Defendants'  
4 motion because of statements it made in its June 4, 2018 Order on the  
5 preliminary injunction. This argument is without merit. This Court received  
6 a one-sided story on the facts of the case and the need for an injunction  
7 because Defendants' prior counsel did not file any opposition to the  
8 preliminary injunction motion. As indicated in Defendants motion and this  
9 reply, Plaintiff's claims suffer from significant deficiencies that have not  
10 been previously raised to the Court. Based on the allegations in the  
11 Complaint, Plaintiff's Counts 1-4, 6, and 8 should be dismissed.

**11 III. ARGUMENT**

12                   **A. The First Sale Doctrine Bars Plaintiff's Lanham Act  
13 Claims.<sup>2</sup>**

14                   Ninth Circuit precedent on the first sale doctrine is clear:

15                   Trademark law generally does not reach the sale of genuine goods  
16 bearing a true mark even though such sale is without the mark  
17 owner's consent. *Once a trademark owner sells his product, the buyer  
ordinarily may resell the product under the original mark without  
incurring any trademark law liability.* The reason is that trademark  
18 law is designed to prevent sellers from confusing or deceiving  
consumers about the origin or make of a product, which confusion  
ordinarily does not exist when a genuine article bearing a true mark is  
19 sold.

20 *NEC Elec. v. CAL Circuit Abco*, 810 F.2d 1506, 1509 (9th Cir. 1987)  
21 (internal citations omitted) (emphasis added). Two admitted facts doom  
22 Plaintiff's Trademark claims. First, Plaintiff alleges that HPI stocks and sells

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25                   <sup>2</sup> Plaintiff does not dispute that its California unfair competition claim in  
26 Count 6 and interference with prospective economic advantage claim in  
27 Count 8 should fall if its Lanham Act are dismissed under the first sale  
28 doctrine. Accordingly, for the reasons discussed in Defendants' Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings as to Counts 104, 6 and 8 of the Complaint, ECF No. 89-1, at 7-8, 11-12, Counts 6 and 8 must be dismissed because Plaintiff's Lanham Act claims are barred by the first sale doctrine.

1 genuine TGC products bearing Plaintiff's trademarks that are purchased  
2 from Plaintiff's Authorized Dealers and Distributors. Compl. ¶¶ 103, 122.  
3 Second, Plaintiff does not allege that HPI has repackaged or otherwise  
4 changed these TGC products. Based on Ninth Circuit law and Plaintiff's fact  
5 allegations deemed true for the purposes of this motion, the first sale  
6 doctrine bars Plaintiff's Lanham Act claims.

7 However, Plaintiff contends that it should be excepted from the first  
8 sale doctrine because (1) HPI did not "lawfully" purchase the TGC products  
9 and (2) the TGC products HPI sold, and which it purchased from Authorized  
10 Dealers, are "materially different" from the TGC products sold by  
11 Authorized Dealers. In view of the Ninth Circuit's decisions in *Sebastian*  
12 *Int'l Inc. v. Longs Drug Stores Corp.*, 53 F.3d 1073 (9th Cir. 1995) and *NEC*  
13 *Elec.*, neither argument has merit.

14 Plaintiff first argues that the first sale doctrine is in applicable because  
15 HPI cannot lawfully purchase TGC products from Authorized Dealers who  
16 sold them to HPI without Plaintiff's authorization. Yet the Ninth Circuit in  
17 *Sebastian* applied the first sale doctrine when faced with exactly this fact  
18 pattern. There, Longs Drug purchased the trademarked products from  
19 members of Sebastian's Collective Membership Program, who were  
20 contractually barred from reselling to non-members such as Longs Drug. *Id.*  
21 at 1074. Presuming that Longs Drug purchased the trademarked products  
22 from collective members who sold them in violation of their contracts with  
23 Sebastian, the Ninth Circuit held that the first sale doctrine precluded  
24 Sebastian's attempt to bar Longs Drug from reselling genuine Sebastian  
25 products purchased on the open market. *Id.* at 1075. "It is the essence of the  
26 'first sale' doctrine that a purchaser who does no more than stock, display,  
27 and resell a producer's product under the producer's trademark violates no  
28 right conferred upon the producer by the Lanham Act." *Id.* at 1076.

1 Following *Sebastian*, HPI's resale of TGC products sourced as alleged by  
 2 Plaintiff cannot preclude application of the first sale doctrine.<sup>3</sup>

3 Plaintiff's next claim that the genuine TGC products sold by HPI are  
 4 "materially different" from those same products sold by Authorized Dealers  
 5 is based on the alleged failure by HPI to provide certain accompanying  
 6 services with the sale of the products. The Ninth Circuit in *NEC Elec.*  
 7 applied the first sale doctrine in a case where the trademark holder argued  
 8 that the lack of accompanying services in conjunction with the sale of the  
 9 genuine product imposed Lanham Act liability. In that case, NEC-USA  
 10 claimed that "part and parcel" of its genuine NEC trademarked computer  
 11 chips was the accompanying "front end technical support to its customers,  
 12 quality control, significant warranty service, extensive advertising and  
 13 promotion of its product, and the selection and training of its technical  
 14 personnel." *NEC Elec., Inc. v. Cal Circuit ABCO, Inc.*, Case No CV 85-  
 15 1344, 1986 WL 765406 at \*6-7 (C.D. Cal. Aug. 20, 1986), *reversed in part,*  
 16 *vacated in part by NEC Elec. v. CAL Circuit Abco*, 810 F.2d 1506, 1509 (9th  
 17 Cir. 1987). The Ninth Circuit, however, held that the lack of the  
 18 accompanying services being provided as part of the sale of the trademarked  
 19 product, and any potential consumer confusion that could arise therefrom,  
 20 was not sufficient to preclude application of the first sale doctrine to bar  
 21 Lanham Act liability. *NEC Elec.*, 810 F.2d at 1509-10. This factually-on-  
 22 point precedent further supports dismissal of Plaintiff's Lanham Act claims  
 23 as alleged.<sup>4</sup>

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25 <sup>3</sup> Plaintiff's citation to this Court's decision in *Curtis v. Shinsachi Pharm. Inc.*, 45 F.Supp.3d 1190, 1202-03 (C.D. Cal. 2014), which applied the first  
 26 sale doctrine in view of *Sebastian*, does not support Plaintiff's argument.

27 <sup>4</sup> Plaintiff claims that *NEC Elec.* is inapplicable because it does not concern  
 28 "important services and training" that accompany health products. Opp. at  
 20. But Plaintiff cites no such cases for support, instead citing cases  
 involving electronics and fragile figurines. These cases are distinguished  
*infra*. The Complaint also fails to allege facts showing that services Plaintiff  
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1 Plaintiff cites a number of cases to argue that the Court should not  
2 follow *NEC Elec.*, but each is readily distinguishable. For example, in  
3 *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d 1083, 1086 (9th Cir. 1998), the  
4 Ninth Circuit did not apply the first sale doctrine because the defendant  
5 reselling the trademarked figurines had repackaged them in a manner that  
6 made it more likely the fragile figurines would be damaged. The Court did  
7 explain that if the defendant disclosed that it had “repackaged” the figurines  
8 the first sale doctrine would apply. *Id.* at 1087. Plaintiff makes no allegation  
9 that HPI repackaged the TGC products.

10 The decision in *HM Elec. Inc. v. R.F. Techs., Inc.*, Case No. 12-cv-  
11 2884-MMA (WMC) 2013 WL 12074966 (S.D. Cal. Oct. 3, 2013) likewise  
12 does not bar applying the first sale doctrine. There, the Court stated that  
13 differences in warranties accompanying a trademarked product *may*  
14 constitute a material difference and did not apply the first sale doctrine  
15 because the defendant sold the trademarked product without any  
16 manufacturer’s warranty. *Id.* at \*3. But Plaintiff has made no allegation that  
17 the genuine TGC products sold by HPI are without warranty coverage.

18 Similarly, this Court’s decision in *Harman Int’l Indus., Inc. v. Pro*  
19 *Sound Gear, Inc.*, Case No. 2:17-cv-06650-ODW (FFMx), 2018 WL  
20 1989518 at \*3 (C.D. Cal. Apr. 24, 2018), is not dispositive because it  
21 involved sales of trademarked products that the defendant altered (removed  
22 serial numbers) and that were without warranty coverage. Again, there are  
23 no allegations that HPI either altered the genuine TGC products it sold or  
24 that these products lacked warranty coverage as a result of such sale. These

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27 \_\_\_\_\_  
28 relies upon for its argument are contractually required, instead alleging only  
that services such as its stock rotation programs are *encouraged by programs*  
*in which dealers are permitted* to participate. See *supra*.

1 authorities do not preclude following *Sebastian* and *NEC Elec.* and barring  
 2 Plaintiff's Lanham Act claims based on the first sale doctrine.

3 Finally, Plaintiff's suggestion that this case is at too preliminary a  
 4 stage to apply the first sale doctrine to dismiss the Lanham Act claims  
 5 ignores cases it cites in its brief. *See, e.g., Sebastian*, 54 F.3d at 1074  
 6 (application of first sale doctrine on motion for preliminary injunction  
 7 phase); *Enesco*, 146 F.3d at 1084 (application of the first sale doctrine at the  
 8 motion to dismiss phase). The pleadings in this case are closed, these claims  
 9 are entirely appropriate for determination under Rule 12(c), and Plaintiff  
 10 cites to no cases holding otherwise.

11           **B. Plaintiff's Contract Claims Fall Under Section 16600.**

12 Plaintiff does not dispute that the Dealer Agreement contains a  
 13 provision barring HPI in perpetuity from promoting, advertising, and selling  
 14 TGC products.<sup>5</sup> Compl. ¶ 63. This provision forever precludes HPI from  
 15 pursuing a portion of its lawful business by selling products purchased on  
 16 the open market and, therefore, is void as an unlawful restraint of trade in  
 17 contravention of California Business and Professions Code section 16600.  
 18 Plaintiff does not argue that any statutory exception to section 16600  
 19 applies.

20 Ninth Circuit has recognized that, "section 16600 voids 'every  
 21 contract' that 'restrains' someone 'from engaging in a lawful profession,  
 22 trade, or business'" and is not limited to any type of contract as Plaintiff  
 23 argues. *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083,  
 24 1090 (9th Cir. 2015). The California Supreme Court ruled that California  
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26  
 27           <sup>5</sup> Plaintiff tries to recast this argument by claiming the Dealer Agreement  
 28 simply "authorizes" the sale of the product and therefore cannot violate  
 section 16600. Opp. at pp. 7-8. This ignores the post-termination ban  
 provision.

1 courts “have been clear in their expression that section 16600 represents a  
 2 strong public policy of the state which should not be diluted by judicial fiat.”  
 3 *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 949 (2008). “Section  
 4 16600 is unambiguous, and if the Legislature intended the statute to apply  
 5 only to restraints that were unreasonable or overbroad, it could have  
 6 included language to that effect.” *Id.* at 950. And it has long been recognized  
 7 by California’s Supreme Court that section 16600 makes “no exception in  
 8 favor of contracts only in partial restraint of trade.” *Chamberlain v.*  
 9 *Augustine*, 172 Cal. 285, 289 (1916).

10 Plaintiff seeks to evade the expansive reach of section 16600 by  
 11 arguing first that the California Supreme Court’s Edwards decision is limited  
 12 to the employment context.<sup>6</sup> Opp. at 8 n.4. Plaintiff cites to *Campbell v. Bd.*  
 13 *of Trustees of the Leland Stanford Junior Univ.*, 817 F.2d 499 (9th Cir. 1987)  
 14 and *Gen. Commercial. Packaging, Inc. v. TPS Package Eng’g, Inc.*, 126  
 15 F.3d 1311 (9th Cir. 1997) to suggest that “narrow restraints,” which only bar  
 16 pursuing a portion of a profession, business or trade, do not violate section  
 17 16600 outside the employment context. Opp. at 8. But the California  
 18 Supreme Court expressly stated in *Edwards* that this judicially created  
 19 “narrow-restraints” exception was inconsistent with section 16600. *Edwards*,  
 20 44 Cal.4th at 949-950. As the Ninth Circuit has noted, *Edwards* disapproved  
 21 the *General Com. Packaging* decision that a narrowly tailored restraint, in  
 22 which a post termination provision barred a business from soliciting a small  
 23 subset of another business’s customers, complied with section 16600.

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25 <sup>6</sup> Plaintiff’s claim that *USS-Posco Indus. v. Case*, 244 Cal.App.4th 197, 208-  
 26 209 (1st Dist. 2016) limits the holding of *Edwards* to employment cases and  
 27 precludes enforcement of section 16600 is wrong for two reasons. First, this  
 28 intermediate appellate decision cannot “limit” the scope of the *Edwards*  
 decision by the California Supreme Court. Second, that case did not apply  
 section 16600 because the training program cost repayment provision did  
 not preclude the employee from competing in his chosen profession.

1     *Golden v. Cal. Emergency Physicians Med. Grp., Inc.*, 896 F.3d 1018, 1022-  
 2     23 (9th Cir. 2018). The law is clear that section 16600 applies to any  
 3     contract. *See Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1040  
 4     (N.D. Cal. 1990)(“A simple reading of [§ 16600], giving the words their  
 5     ordinary meaning, demonstrates that the California state legislature intended  
 6     section 16600 to apply to any sort of contract which contains a covenant  
 7     restraining competition.”)

8                 Plaintiff completely ignores the fact that section 16600 has routinely  
 9     been applied to post termination restraints on trade in contracts similar to the  
 10    Dealer Agreement. *See e.g., Gatan, Inc. v. Nion Co.*, Case No. 15-cv-1862-  
 11    PJH, 2016 WL 1243477 at \*3 (N.D. Cal. Mar. 30, 2016) (holding one-year  
 12    ban on distributing competing or similar products in reseller agreement void  
 13    under § 16600); *Beatty Safway Scaffold, Inc. v. Skrable*, 180 Cal.App.2d  
 14    650, 656 (1960)(finding three-year post-termination bar on competition in  
 15    distributor agreement violated § 16600); *Scott*, 732 F. Supp. at 1042-42  
 16    (holding franchise agreement’s two-year post termination bar against  
 17    operating competing business in former franchise area unenforceable under  
 18    § 16600).

19                 Plaintiff next claims that the Dealer Agreement does not contain any  
 20    prohibition on competition in an effort to restyle the agreement as protecting  
 21    other interests. Opp. at 11. This is verifiably false based on its post-  
 22    termination perpetual ban on selling TGC products. But even if the Dealer  
 23    Agreement seeks to protect other interests, it does not operate to bar  
 24    application of section 16600.

25                 Plaintiff’s misplaced reliance on *Gatan* is instructive. In *Gatan* the  
 26    district court granted defendant’s motion to dismiss a breach of contract  
 27    claim based on a post-termination ban on the marketing and sale of similar  
 28    or competitive product because such a restraint was void under section

1 16600. *Gatan*, 2016 WL 1243477 at \*3. The court acknowledged a trade  
 2 secret exception exists to section 16600, but found that exception  
 3 inapplicable under the facts. *Id.* *Gatan* clearly supports the application of  
 4 section 16600 to the Dealer Agreement.<sup>7</sup>

5       Finally, Plaintiff suggests that section 16600 should not be applied to  
 6 the Dealer Agreement because “strong public policy concerns” support  
 7 enforcing its post-termination obligations. Opp. at 14-15. There is no support  
 8 for this argument. First, not one of the three cases Plaintiff cites addresses  
 9 the application of section 16600. All are in the trademark context. Second,  
 10 Plaintiff premises its argument on conclusory legal allegations cast as factual  
 11 assertions. *Id.* (HPI “used TGC’s intellectual property without authorization  
 12 and *to falsely hold itself out to the public as associated with TGC*” and  
 13 “*tortiously interfered with TGC’s contracts* with its Authorized Dealers.”)  
 14 (emphasis added). As such, these statements cannot preclude dismissal.

15       The law dictates that *any contract* that restricts the pursuit of *even a*  
 16 *portion* of a lawful business is void under section 16600. Plaintiff seeks  
 17 through its Dealer Agreement to enforce a perpetual post-termination bar on  
 18 HPI from selling TGC products. Plaintiff cannot identify any exception to  
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21       <sup>7</sup> Plaintiff’s reliance on *Hollingsworth Solderless Terminal Co. v. Turley*,  
 22 622 F.2d 1324 (9th Cir. 1980), *Gatsinaris v. ART Corp. Sols. Inc.*, SA CV  
 23 15-0741-DOC, 2015 WL 4208595 (C.D. Cal. July 10, 2015), and *Kolling v.*  
*Dow Jones & Co.*, 137 Cal.App.3d 709 (1st Dist. 1982) is also misplaced. In  
*Hollingsworth* the district court found it premature to void a restrictive  
 24 covenant under section 16600 because the employee may have been  
 25 improperly using proprietary information to compete against his former  
 26 employer. *Hollingsworth*, 622 F.2d at 1338-39. *Gatsinaris* made a similar  
 27 finding, holding section 16600 inapplicable because the restrictive covenant  
 28 “restrict[ed] the Plaintiffs’ ability to use Defendants’ proprietary  
 information” to compete. *Gatsinaris*, 2015 WL 4208595 at \*14. This fact  
 pattern does not apply to this case. *Kolling* is inapposite because it does not  
 address section 16600 but rather addresses California’s Cartwright Act under  
 Business and Professions Code section 16700 et seq.

1 section 16600 that saves its post-termination ban. As a result, the Dealer  
2 Agreement is void under section 16600.

3 **V. CONCLUSION**

4 For the foregoing reasons, Defendants ask the Court to dismiss Counts  
5 1-4, 6, and 8 of the Complaint.

6  
7 DATED: November 5, 2018 Respectfully submitted,

8  
9 By: /s/Richard C. Vasquez  
10 Richard C. Vasquez  
11 Attorneys for Defendants  
HEALTHYPETS, INC. and MANDEEP  
GHUMMAN

12 Richard C. Vasquez  
13 Jeffrey T. Lindgren  
14 VASQUEZ BENISEK & LINDGREN LLP  
3685 Mt. Diablo Boulevard, Suite 300  
15 Lafayette, CA 94549  
925-627-4250  
16 925-403-0900-Fax  
17 [rvasquez@vbllaw.com](mailto:rvasquez@vbllaw.com)  
[jlindgren@vbllaw.com](mailto:jlindgren@vbllaw.com)

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21 **CERTIFICATE OF SERVICE**

22 The undersigned hereby certifies that all counsel of record who are  
23 deemed to have consented to electronic service are being served with a copy  
24 of this document via the Court's CM/ECF system on November 5, 2018.  
25

26 /s/Richard C. Vasquez  
27  
28